United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4046

United States Court of Appeals

FOR THE SECOND CIRCUIT

CARRIER AIR CONDITIONING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,
Intervenor.

On Petition to Review an Order of the National Labor Relations Board

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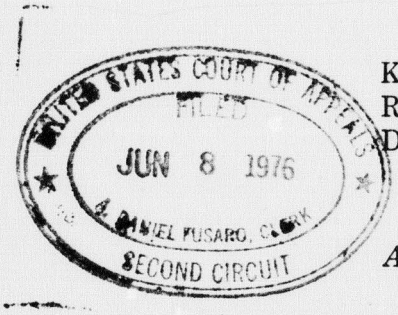
BRIEF FOR CARRIER AIR CONDITIONING COMPANY



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BRIEF FOR CARRIER AIR CONDITIONING COMPANY

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board erred in holding that a union may, without violating Section 8(e) or 8(b)(4)(B) of the Act, enforce an agreement requiring an employer to cease or refrain from handling or installing certain prefabricated products, without regard to "primary-secondary employer or work preservation issues," so long as the enforcement is effected "through peaceful means provided by the agreement and by no other means."

2. Whether the Board erred in concluding, contrary to the Administrative Law Judge, that the statements and conduct of Local 28, its officers and agents in furtherance of the boycott against Carrier's Moduline units did not amount to inducements and coercion violative of Section 8(b)(4)(i) and (ii)(B) of the Act.

STATEMENT OF THE CASE

I. The Court's Jurisdiction

This case is before the Court upon the petition of Carrier Air Conditioning Company (herein "Carrier"), pursuant to Section 10(f) of the National Labor Relations Act (herein "the Act"), as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), to review and set aside an order issued by the National Labor Relations Board on February 5, 1976, and reported at 222 NLRB No. 110. This Court's jurisdiction is invoked under Section 10(f) of the Act, as the events in question occurred and Carrier transacts business within this judicial circuit. The respondent in the Board proceeding, the Sheet Metal Workers International Association, Local 28, AFL-CIO, (herein "Local 28" or "the Union") has been granted permission to intervene herein.

II. The Nature of the Issue Presented

Carrier filed the unfair labor practice charges in this case in an effort to obtain relief from Local 28's long-standing boycott of Carrier's factory-fabricated Moduline air conditioning units. As the following factual recitations shows, the boycott has been implemented by Local 28 through various means over the past ten years, but principally through enforcement and threatened enforcement of restrictive clauses in Local 28's labor contracts with New York area sheet metal contractors. Local 28 has, with the contractors' acquiescence, consistently interpreted those clauses to proscribe installation of Carrier's Moduline units by signatory contractors' employees unless the plenum portions of the units are made in a

New York area sheet metal shop employing Local 28 members.[1] Throughout the dispute, Local 28 officials have repeatedly sought Carrier's agreement to allow fabrication of the plenums in New York shops, but Carrier has, with rare exceptions, refused because of the inability of the shops to meet quality or performance standards.

The Board's General Counsel issued the complaint in this case alleging that Local 28's reaffirmation and enforcement of the restrictive clauses of its agreements with the contractors against the Carrier units violated Sections 8(e) and 8(b)(4)(B) of the Act. Other coercion and inducements in violation of 8(b)(4)(B) were also alleged. The Administrative Law Judge found that Local 28 had violated the Act as charged. The Board, however, reversed the ALJ's conclusions and ordered dismissal of the complaint on the strength of its decision in *Associated General Contractors of California*[2] since, in its view, Local 28's enforcement of its contractual rights did not involve any "coercive tactics proscribed by the Act" (A. 41).[3]

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[1] See discussion at pp. 35-37, *infra*. Generally the Union's mere assertion that its standard labor contract prohibits installation of the units as prefabricated by Carrier has been sufficient to block the use of the product in New York-area construction projects. In certain instances detailed below, however, the Union has taken formal steps to enforce the ban.

[2] *Southern California Pipe Trades District Council No. 16 of the United Association, et al. (Associated General Contractors of California, Inc)*, 207 NLRB 698 (1973). The Board acknowledged that its decision in that case was reversed by the Ninth Circuit Court of Appeals in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975). The Board announced, however, without explanation, that it would not follow the Ninth Circuit's decision but would adhere instead to its own holding in the *Associated General Contractors* case (A.40).

[3] "A." references are to the printed appendix. References preceding a semicolon are to the Board and ALJ decisions; those following a semicolon are to the supporting evidence.

The substance of the Board's holding is that a union may lawfully enforce an agreement requiring an employer to cease or refrain from handling a particular prefabricated product, so long as the enforcement is effected "through peaceful means provided by the agreement and by no other means" (A. 41). As in *Associated General Contractors*, moreover, the Board stated that it would apply this rule notwithstanding any "primary-secondary employer or work preservation issues" in the case (A. 42).[4] The Board also rejected the ALJ's findings of coercion and inducements in violation of Section 8(b)(4)(B), since it viewed all of the Union's conduct as merely relating back to its basic "position that it would not relinquish its rights under the collective-bargaining agreement" with the sheet metal contractors (A. 38-41).

The facts of the case, which are essentially undisputed, are set forth below.

STATEMENT OF FACTS

I. The Restrictive Work Clauses of Local 28's Collective Bargaining Agreements With The Contractors Association and Three Boro.

The relevant collective bargaining agreement between Local 28 and the New York City Chapter of SMACNA[5] took effect on August 31, 1972, and expired on June 30, 1975 (A. 32; 79-89). The agreement contains an article identified as Addendum B, Part II, entitled "Memorandum Containing No Subcontracting Clause," which pur-

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[4] See 207 NLRB at 700. It is also clear that the Board's rule is not confined to or dependent upon the "construction industry proviso" to Section 8(e) of the Act, which allows certain restrictive agreements relating to work to be done exclusively on the site of a construction project. It is undisputed that the construction industry proviso is not applicable in this case. (See discussion at pp. 29-30, n. 24, *infra*).

[5] Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc.

ports to be intended for "the preservation of the work opportunities of the journeymen sheet metal workers and apprentice sheet metal workers within the collective bargaining unit . . ." (A. 32; 86). This article prohibits employers bound by the agreement from subcontracting, *except* to "any other Employer within the collective bargaining unit," any of several enumerated types of work, or any "other work historically, traditionally and customarily performed by journeymen sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement."

Substantially identical language was contained in the previous agreement between Local 28 and the Association (A. 76-77), except that when the 1972-1975 agreement was negotiated, an additional, unnumbered paragraph was added to Addendum B, Part II, in an apparent attempt to give it broader coverage (see comments of counsel at A. 454). The new paragraph reads: "All the work described in this 'no subcontracting clause' shall be performed by journeymen and/or apprentice sheet metal workers in the bargaining unit covered by this Agreement." (A. 32; compare 76-77 with 86).

No penalty is specified within the "no subcontracting" clause itself, but Rule XIX provides that the penalty for any violation of the agreement (other than violations of Article VII, Section 1, not material here) shall be censure for the first offense. In case of second offenses, provision is made for imposition of "a fine . . . commensurate with the loss adjudged by the Joint Adjustment Board to have been sustained by journeymen sheet metal workers by reason of such violation." (A. 32; 88).

II. The Boycotted Products—Carrier's Moduline Air Terminal Units.

The products involved in this case, Carrier's Moduline units, were found by the Administrative Law Judge to

be "a new and different product" (A. 21).[6] They are patented[7] air terminal devices designed to regulate the flow of conditioned air into the rooms of a building. The units are installed in the ceilings and are connected by ducts to a central fan room, where outside air is drawn into the building, mixed with return air, filtered, heated or cooled and otherwise conditioned. The air is forced by fan pressure through the ducts to Moduline units located throughout the building. It passes from the ducts into the plenum portion of the Moduline and thence through a distribution baffle, past a bellows, and is discharged into the room through a diffuser. Only the diffuser slots are visible in the room after the unit is installed. The remainder of the Moduline is concealed above the ceiling (A. 171-174).

Carrier began marketing the first model of the Moduline series, designated as Model 37P, in the early 1960's (A. 178, 403). Subsequent innovations led to the development of a more sophisticated unit known as

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[6] This finding of the Judge was made in connection with his ruling that the fabrication and installation of these units is not work traditionally and historically performed on the job site by the members of Local 28 (A. 21). Under the Board's view, however, its disposition of the case made it unnecessary to reach this "work preservation" issue (A. 41).

[7] The Board stated in its decision that "[a]though numerous parts of [the Moduline units] are patented, the plenum is not." (A. 33). The Board's statement, however, is misleading. As the Administrative Law Judge correctly pointed out (A. 12-13, 22) stipulated evidence (A. 59-61 para. 11, and 70-73) and credited testimony (A. 243-244, 418-420) show that Carrier is the owner of numerous patents covering the fabrication and assembly of the entire Moduline unit, including the plenum. As we show below, pp. 7-8, the work in dispute in this case involves the proper mating of the plenum to the control portions of the units, along with precise testing, calibration and adjustment. These patents, therefore, are directly related to the work in question. Indeed, as discussed in further detail below, p. 40, the patents prevent fabrication or assembly of the units, either in whole or in part, by persons other than Carrier employees without Carrier's assent (A. 418). Issuance of patents, of course, indicates a finding by the Patent Office that the product is novel and unique.

Model 37A about 1970 (A. 178, 203). See *infra*, pp. 12-13. Presently, both the 37P and 37A are marketed throughout the United States.[8]

Selection of the type of air conditioning system to be used in a building is typically made by the project architects and engineers, subject to final approval by the owner (A. 3; 171). The Moduline series is designed to offer architects, engineers, owners and occupants of a building a number of important advantages over conventional systems. Carrier's sales efforts are addressed primarily to the architects and engineers (A. 3; 169-170). Among features emphasized in the sales promotional materials for the Moduline are its quiet, draftless operation, its competitive cost, and Carrier's guarantee that the unit will perform properly (GC Ex. 2, App. A and B).

These features are possible because of the way in which Modulines are manufactured.[9] Carrier makes the units in their entirety, including plenum portions thereof,

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[8] The parties stipulated at the hearing that the units are installed by Sheet Metal Workers with the plenums intact, as manufactured at the Tyler, Texas, plant, without resistance from SMWIA locals, in all areas of the country except in Local 28's jurisdictional territory (A. 427-428). Although the Administrative Law Judge ruled that the labor conditions and organizational status of the employees at that plant are irrelevant to the issues in this case, counsel for the General Counsel offered to prove that the sheet metal workers at the Tyler plant are represented by Sheet Metal Workers International Association Local 527 (A. 179).

[9] At the hearing, counsel for the General Counsel was permitted to make only a partial showing of the details of the manufacturing process whereby Moduline units, including the plenum portions thereof, are produced at the Tyler, Texas, plant. Further details of this process were excluded by the ALJ, we believe improperly, since they would clearly support his ultimate finding that Local 28's efforts "to acquire work performed by employees" of Carrier in Tyler, Texas, cannot be justified on a *National Woodwork* theory. (See *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967)). Thus, the details of the manufacturing process set forth in the General Counsel's offers of proof (A. 421-422, 425-426) reveal a process which *cannot* be performed in any Local 28 shops in New York.

at its factory in Tyler, Texas (A. 3; 178). Specially trained factory personnel perform the work of mating the plenums to the control portions of the units and calibrating or adjusting the bellows assembly to assure proper plenum pressure and air flow (A. 413-417). This calibration or adjustment process, which was described by Carrier Engineering Section Manager Daniel Fragnito as "the whole heart of the unit" (A. 414), must be performed *after* the control assembly has been attached to the plenum (*Ibid.*). It requires the use of special, costly calibration equipment available at the Tyler facility (A. 415-416), and must be performed under the supervision of Carrier engineering personnel (A. 11; 416-417).

Fragnito testified that it "would be extremely difficult" for persons other than trained Carrier employees working in the specially equipped Tyler plant to fabricate the plenums and thereafter unite them properly with the control portions of the units (A. 11; 417). This is particularly so in the case of the Model 37A unit, which is considerably more complicated to assemble than the 37P, in that "the control part of the unit, the bellows assembly part of the unit, is a part of the plenum" in the 37A (A. 412-414), whereas the control portion of the 37P is attached below the plenum section.

III. Background Events.

A. *Local 28's Resistance to the Introduction of Model 37P Moduline Units in the New York City Area.*

The history of Local 28's opposition to the use of Carrier's Moduline units in New York area construction is recounted in the credited (A. 22-24) testimony of August C. Contardi. Contardi, an engineer of 38 years professional experience, has served as district manager of Carrier's Machinery and Systems Division for the New York metropolitan area since 1959 (A. 166-167). As Contardi testified, Carrier first introduced the Moduline to the New York market in 1966 (A. 33; 181-

182). In August of that year, Carrier received an order for 600 Model 37P units for a Presbyterian Hospital project (A. 33; 184). At the same time, the Company was redesigning its own 8th floor office space at 385 Madison Avenue in New York City and was planning to install 37P units there (A. 33; 184-185).

In November 1966, prior to delivery of the Moduline units for these jobs, Contardi met with Mel Farrell, then president of Local 28, and another official of the local, and showed them a sample of the 37P unit. After examining it, Farrell stated that "the unit, as they saw it there, could not come into New York" (A. 3, 33; 183). He suggested that the "plenum section should be made in New York and if [Carrier] would agree to do that, then the unit could come in" (*Id.*). Farrell added that by " 'made in New York,' he meant a New York shop, a Local 28 affiliated shop." (A. 3-4, 33; 183).

On January 4, 1967, the 37P units for the Carrier New York office were delivered to the jobsite. They were to be installed by a contractor called Buensod, Stacy, under a contract from Carrier (A. 33-34; 184). On January 6, Farrell and Local 28 business agent Frank Weigel came to the 8th floor office jobsite together and told Contardi that the 37P units as delivered "could not be installed, the [plenum] section would have to be made in New York in a Local 28 shop" (A. 34; 187-188). Farrell also criticized the contractor "for taking the order . . . before consulting with him" (A. 188-189). Responding to Farrell's assertion that the Moduline units could not be installed, Contardi said, "Mel, you know what your recourse is. Bring us up on charges." (A. 189).[10] Contardi and Farrell subsequently did appear

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[10] At that time, Carrier was a member of the Mechanical Contractors Association, which had a contract with Local 28 providing for resolution of disputes between contractors and the Union by a Joint Trade Board. Carrier is still a member of the Mechanical Contractors Association, but that association no longer has a contract with Local 28 (A. 189-190).

before the Joint Trade Board, at which time Farrell restated his position that "the unit as made would not come into New York" (A. 190-192).[11] That proceeding was adjourned without a decision.

A couple of days later, about January 20, 1967, a meeting was held at Farrell's office attended by representatives and counsel from Carrier, the Mechanical Contractors Association, the sheet metal contractors association and Local 28. Contardi, speaking for Carrier, asked the Union for "relief" on the two current jobs—i.e., Presbyterian Hospital and the Carrier 8th floor office—in exchange for the Company's agreement to try to redesign the 37P unit so that "the plenum could be made locally and the remainder of the unit brought in" (A. 194). The parties agreed to this "deal," and, as a result, the two jobs were allowed to proceed to completion and Carrier did "attempt to design a unit that would fulfill [Farrell's] requirements" (A. 4, 34; 195).

In September 1967, Carrier received an order for Moduline 37P units for the new Police Office Building to be constructed in Manhattan. Farrell objected to the design of the project, claiming, *inter alia*, that the use of the Carrier units as specified would violate the "deal" between Carrier and Local 28 (A. 4, 34; 198). At a series of meetings in September and October 1967, he raised this objection before representatives of the architects, engineers and contractors' associations involved with the project, as well as Carrier and officials of the City government (*Ibid.*). On October 31, 1967, an agreement applicable to the Police Office job was executed (A. 4, 34; 91-92) providing in pertinent part that (A. 91-92):

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[11] Farrell's chief complaint at the time appeared to be that Carrier's plant in Tyler, Texas, was non-union, which it was. Counsel for the General Counsel offered to prove, however, that the employees at the Tyler plant have, since 1968, been represented by Sheet Metal Workers International Association Local 527, a sister local of the respondent herein (A. 179).

3. With respect to the Moduline terminal, it was stated that the basic open question was the insistence of the Local that the 4-sided plenum comprising the top portion of the terminal be manufactured by Local Union 28.

   Carrier indicated that they are presently developing a design of the terminal which would make possible the manufacture of the plenum by the Local. It is anticipated that this design would be completed within one month and that they fully believe that it will be acceptable to Local 28.

4. The Architect and Engineer stated that they would require individual responsibility for the plenum and terminal performance as a single unit. It was proposed that the specifications would contain all clauses required by Carrier to give Carrier sufficient authority to enable Carrier to assume this responsibility. Carrier agreed that with these stipulations they will be prepared to assume this responsibility.

Pursuant to this agreement, the work of fabricating plenums for the Model 37P units for the Police Office job was given to Triangle Sheet Metal Corporation, a New York area shop whose employees are represented by Local 28 (A. 4, 34; 199). Triangle was to make the plenums using plans supplied by Carrier and ship them to the jobsite, where they would be united with the control portion of the units which Carrier would supply from its Tyler plant (A. 255-257). As the ALJ found (A. 7, 22), this arrangement led to serious problems, because the plenums made by Triangle could not be fitted properly with the portions of the unit supplied by Carrier (A. 258-261). The units leaked air and were noisy in operation. In the end, Carrier, having undertaken individual responsibility for the proper functioning of the units in its agreement with the City, was forced to assume approximately $10,000.00 in additional costs necessary to correct the defects in an attempt to make

the units function properly (A. 22, 34-35; 258-261, 498-501).

Thereafter, Carrier made other efforts to market 37P units in the New York area with plenums fabricated separately in accordance with its "deal" with Local 28, but without success. As Contardi explained, "We just couldn't sell the unit [under these terms]. It's that simple. . . . It was not economically feasible, it would not sell" (A. 4, 34; 202-203). Thus, with the exception of one project in Staten Island for which an order for 37P units was arranged through a Carrier distributor and possibly one or two other very small jobs (A. 263-265, 271-272), the Company was unable to obtain any orders for Moduline units with plenums to be fabricated separately.[12]

B. *Local 28's Continued Opposition to Modulines following Development of Model 37A.*

On August 8, 1970, following the introduction of Carrier's new Model 37A unit, Company spokesmen met with Farrell and other Local 28 agents to discuss Carriers' desire to market the new unit in the New York area free of the restrictions the Union had imposed with respect to the Model 37P unit (A. 4, 35; 202; Tr. 99-103). The Carrier representatives stated that the 37A unit was of a new and different design and could not be produced with the plenum section made outside the factory (A. 35; Tr. 103). Additionally, they pointed out that they had not been able to market the 37P under the terms insisted on by the Union, since fabrication of the plenums in New York shops made the units both defective and uncompetitive in price (A. 4; Tr. 102-103). Farrell indicated he would give the matter

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[12] Plenums for the units on the Staten Island job were fabricated at the shop of Essex Metal Works in Long Island City, N. Y., by employees represented by Local 28 (A. 263-264, 548-549). As the ALJ noted, serious problems similar to those encountered in connection with the Police Office job also developed in this instance (A. 22; 265-266, 405-406, 407-408).

study and asked to be supplied with a sample of the 37A unit (Tr. 103). This was done, and a number of meetings were held with Farrell thereafter to discuss the situation. He maintained the same position with respect to the 37A unit as he had with respect to the 37P, however, and the dispute remained unresolved at the time of his death in 1972 (A. 4, 35; 203-204).

Farrell's successor as president of Local 28 was Dan Pasquinucci (A. 4). In August 1972, Contardi and other Carrier spokesmen met with Pasquinucci at the Local 28 office. Also present was Larry Sturgis, then the director of the Sheet Metal Industry Promotion Fund in New York (A. 205).[13] The history of the dispute over the Moduline was reviewed, and Pasquinucci said he "would like to get an opinion from his own people on it" (A. 207). He stated that "based on what he had been able to see, maybe the unit did contribute to the industry and he would like to know more about it, so . . . he was going to appoint a committee to study this . . ." (A. 207). In the meantime Pasquinucci cautioned that Carrier "could not bring the unit in until we had some kind of understanding" (A. 4; 207-208).

C. *Expert Assessment of the Potential Impact of the Moduline on Work Opportunities of Local 28 Members.*

The issue was subsequently referred by Pasquinucci to a Sheet Metal Industry Research and Review Committee, made up of three Local 28 members who had

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[13] The Industry Promotion Fund is established under Article XV of the agreement between the Contractors Association and Local 28 to "promote the welfare of the Sheet Metal Industry within the City of New York and more specifically to make known the jurisdiction of the industry . . . , stabilize and improve Employer-Union relations, . . . and to disseminate to General Contractors, Architects, Engineers and Owners information about the kind, quality and merits of work done by the industry, to make public the terms and conditions of this agreement to avoid grievances and jurisdictional disputes and provide expanded opportunities for employment of journeymen sheet metal workers" (A. 85).

been appointed by Farrell and were recognized as experts in the sheet metal industry (A. 460-461).[14] In October 1972, the Committee submitted a report (A. 93-97) to Pasquinucci "unanimously recommend[ing] acceptance of Carrier Moduline variable volume system, factory fabricated, leak tested and calibrated." (A. 5, 35; 93).

In support of this recommendation, the Committee report sets forth a detailed analysis of the advantages of Moduline units as fabricated in the factory, including the Committee's finding that acceptance of the units for the New York market *would result in increased work opportunities for Local 28 members* (A. 95-96). Thus, the report points out, *inter alia*, that since all of the cooling in a Moduline system is done by air, the system requires an extensive network of distribution ducts, installation of which "belongs to the sheet metal worker" (A. 95). In contrast, many alternative systems cool by water circulation, thus providing considerable piping work for plumbers but little sheet metal work. Likewise, "fan coil system[s], unit ventilator system[s] or through the wall type units," which the Moduline would replace, were found to "represent little sheet metal work" (A. 95). Additionally, the report notes that:

> the moduline system is not compatible for use with roof top units. Roof top units by their nature mean minimum duct systems. The moduline system has been a competitive system to the roof top market and a deterrent to their use. (A. 96).

Other increased sheet metal work opportunities cited in the report include the complete job of installing controls

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[14] All three members of the Committee—William Connolly, Richard Berman and Howard Bretz—were sheet metal sketchers in "key positions" in the industry. Bretz testified that both Connolly and Berman were involved in teaching evening classes for journeymen and "were considered the tops in the business, both of them" (A. 368). Bretz himself was head of the Sheet Metal Department for the New York Trades School for some 12 years and was a trustee of the Joint Apprenticeship Committee, as well as the author of a book on drafting published in 1972 (A. 357, 370-371).

on Moduline systems, which in conventional systems would be done by plumbers, steamfitters or electricians; all testing and balancing work; and all subsequent "tenant change" work requiring relocation or modification of the Moduline units (A. 96).

In addition to listing many advantages to the sheet metal worker in the use of the Moduline system, the Committee report points out that the Moduline has been broadly marketed in other areas of the country but not sold in New York City because of "the trade restriction" (A. 94).[15] Background material on the system set forth in the report clearly reflects the Committee's expert view that the Moduline involves work which is new to the sheet metal worker and is "more complex than normal" because it is "precision installation work." Thus, the Committee concluded that acceptance of the Moduline in New York would not only increase the work available to Local 28 members, but would give them a greater share of the overall responsibility for air conditioning systems as well (A. 95-96).

About the same time, Industry Promotion Fund Director Larry Sturgis conducted his own study of the impact of variable volume air conditioning systems on the sheet metal industry, and his conclusions support those reached by Local 28's Research and Review Committee. In his report (A. 137-139) to the Board of Trustees of the Sheet Metal Industry Council of New York City, issued on February 1, 1973, Sturgis stated that any "loss" of fabrication work by contractors who had previously made plenum boxes for variable volume units would be "more than offset" by "the man hours and additional work" gained through acceptance of the

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[15] The Committee report also supports Carrier's conclusion that the units cannot be guaranteed to function properly unless completely fabricated in the Carrier factory. The report states, "It was determined by field inspection and examination that the only method the manufacturer can test and control production is to make a complete air tight unit that can be put under pressure" (A. 94).

units which plenums already assembled (A. 138).[16] Sturgis noted that "Mell Ferrel's [sic] original position was that the box must be made by members of Local #28," but expressed the belief that "there has been a shift in this position recently and now most officials in Local #28 agree generally that Variable Volume units should be brought in as a complete unit" (A. 138). Sturgis said this should be done by common consent of the contractors and Local 28, since "variable volume units are not a part of any existing agreement." Alternatively, he suggested that approval of such systems could be "specif[ied] in written agreement" through the Joint Adjustment Board (A. 138).

D. *The Refusal of Local 28's Executive Board and the Joint Adjustment Board to Permit "Modification" of Their Collective Bargaining Agreement to Allow Installation of Moduline Units.*

After receiving the report of the Research and Review Committee, Pasquinucci submitted their recommendation to the Local 28 Executive Board with his endorsement (A. 8; 461-463). The Executive Board, however, was of the opinion that acceptance of the Carrier units with prefabricated plenums would be "in violation of our agreement . . . and they weren't ready to change it" (A. 463). Thereafter, in February 1973, Sturgis appeared before the Exectiuve Board and urged them to "push aside their agreement, and go along with this moduline unit . . ." (A. 13; 464-465). As Pasquinucci recounted, the Board "finally came to the conclusion that Mr. Sturgis was asking them to change their agreement, and . . .

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[16] Unlike the Research and Review Committee report, Sturgis' report does not specifically distinguish between Carrier Moduline units and other "variable volume" systems. The Research and Review Committee did make this distinction, and clearly indicated that its findings applied only to the Carrier units: "Competitive systems which are acceptable in New York City do not offer any additional sheet metal work. In fact, some competitive offerings are used with a large control device and a minimum number of outlets, which in turn, require a minimum duct distribution system" (A. 97).

suggested that Mr. Sturgis go before the Joint Adjustment Board, and give them the situation of the moduline unit, because it was out of their hands to change the agreement" (A. 13; 464-466).[17]

Sturgis did present the matter to the JAB on April 26, 1973 (A. 8; 325, 347). As described in his credited testimony, his purpose in doing so was "so the industry could agree or disagree collectively on this particular item, rather than make it a one-sided union or one-sided management thing" (A. 347-348). In Pasquinucci's words, Sturgis' "strenuously tried to have the Joint Board modify the agreement, and stuff, on the moduline units, but unfortunately it was to no avail" (A. 465-466). In short, the JAB did not agree to permit such a "modification" of the contract.

By way of compromise, Sturgis proposed before the JAB that a "pilot project" using Moduline units be undertaken in New York City (A. 466-467). This proposal was not adopted, but was taken back to Local 28's Executive Board, where it was considered at meetings on May 30 and June 5, 1973 (A. 134-136, 468-469). As shown by the minutes of those meetings, the Executive Board ultimately rejected the proposal. As Pasquinucci put it, "The Executive Board would not go along with it, as it meant modification of their agreement, and they weren't ready to attempt the installation of this moduline unit in the hopes that the potential would give them more work" (A. 467). Instead, as shown by the minutes of the May 30 and June 5 meetings, the Executive Board adopted a resolution "that *no allowance* in C.B.A. [collective bargaining agreement] *at all be made to allow the dual Moduline Mixing Box in the New York City area*" (A. 13, 35; 135) (Emphasis added).

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[17] The Joint Adjustment Board is established under Rule XII of the Standard Form agreement between Local 28 and the Contractors Association to resolve disputes arising under the agreement. It consists of an equal number of Union and employer representatives (A. 87-88).

IV. Current Events and Conduct.

A. *The Presentation to the Local 28 Membership of the Executive Board's Resolution Refusing to Make An "Allowance" for the Moduline.*

On June 21, 1973, minutes of the Executive Board meetings of May 30 and June 5, 1973, setting forth that body's resolution refusing to make an "allowance" for the Moduline were read to the Local 28 membership at a union meeting. Howard Bretz, one of the authors of the Committee report discussed above, spoke out at the meeting objecting to the acceptance of the Executive Board's action and attempted to "enlighten the membership a little more" about the issue. Despite Bretz' efforts, however, the membership voted to approve the minutes setting forth the Executive Board's resolution (A. 10, 35; 135, 366-367).

B. *The Refusal to Sketch the Van Etten Drug Treatment Center Job and Related Discussions Between Local 28 and Carrier.*

Early in 1973, plans were prepared by the New York architectural firm of Isadore and Zachary Rosenfield, with the assistance of consulting engineers Hankins & Anderson of Richmond, Virginia, for a construction project at the Van Etten Drug Treatment Center in the Bronx, New York, a facility jointly owned by the Albert Einstein College of Medicine, the Health and Hospital Corporation of the City of New York and the Van Etten Drug Treatment Program (A. 7; 59, 63-64, paras. 6-9, 20-21). The mechanical specifications dealing with Heating, Ventilating and Air Conditioning call, *inter alia*, for the use of "variable volume linear air diffusers, Carrier Moduline, or approved equal" (A. 35; 105). Raymond Skorupa, the project architect from the Rosenfield firm who handled the job, testified that the decision to use Carrier Moduline units was based on a recommendation to him by Hankins & Anderson, and was ultimately approved by the project owners (A. 7; 300-302).

Invitations to bid on the Van Etten project were issued on or about June 18, 1973. The instructions to bidders issued with the specifications for the project provided that all bids were to be "based on the materials and equipment described in the bidding documents" and that "no substitutions will be considered and the opportunity to request substitutions shall be waived, unless written request has been submitted to the Architect in the Architect's sole discretion, for approval at least ten days prior to the date for receipt of bids" (A. 104-105).

Bids were submitted pursuant to these instructions, and, about June 26, 1973, a contract was awarded by the project owners to Ormar Building Corporation to act as construction managers for the project (A. 64, para. 22, and 107-110). Ormar subcontracted the heating, ventilating and air conditioning work for the project to Acme Climate Control Corp. (A. 64, para. 23, and 111-112). Thereafter, about August 10, 1973, in accordance with the specifications, Acme issued a purchase order to Carlton-Stuart Corp., a distributor of Carrier, confirming an order for, *inter alia*, 92 "Variable Volume terminals and Sleeves w/access'/," which were Carrier Model 37A Moduline units, to be shipped to the Van Etten jobsite in early January (A. 35; 64-65, para. 24, and 113). The order called for the units to be shipped with the plenum attached (A. 397).

Subsequently Acme entered into a subcontract with Three Boro [18] to perform *inter alia*, the work of installing the Carrier 37A units already ordered for the Van Etten job. Their initial verbal agreement was confirmed

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[18] Three Boro, although not a member of the Contractors Association, is party to an identical collective bargaining agreement with Local 28. For Three Boro executed a Memorandum of Understanding with Local 28 on July 6, 1972, wherein it agreed to adopt as its own agreement any agreement subsequently reached between Local 28 and the Association (A. 89-90). Accordingly, Three Boro became bound by the Standard Form agreement (A. 36; 79-88) as of August 31, 1972.

by Three Boro in a letter to Acme president Joseph Reyes on October 8, 1973 (A.36; 65, para. 25, and 116-117). The letter reflects the parties' understanding that Three Boro was to perform, in accordance with the job specifications, the installation only of "air outlets, fans, air conditioning equipment" and other items to be "furnished by others." Specifically excepted from the work Three Boro was to perform was a list of items including the making of "plenums for Carrier units" (A.36; 116, 400-401).[19]

About October 18, 1973, Three Boro employee Ted Johansmeyer, the sketcher assigned to prepare blueprint drawings showing the work to be done by Three Boro on the Van Etten job, erased the Carrier Moduline units from the drawings (A.5, 10, 36; 392-394). Word of this development was communicated to Contardi who was vacationing in Florida, and he promptly called Pasquinucci to discuss the matter. Contardi's account of their telephone conversation which the ALJ credited (A.24, 36), is as follows (A.219-220):

> I said, 'Dan, I hear that there's trouble on the Van Etten job.'
>
> I said, 'Dan, I understand you have refused to let them sketch the job.'
>
> He said, 'That's so.'
>
> I said, 'Dan, are you, as a union representative telling me, as a representative of Carrier, that you will not permit this unit to come in, into New York?
>
> He said, 'That's so.'

About the time of this incident or shortly thereafter, a verbal request was made to project architect Skorupa to permit a substitution for the Moduline units that had been specified for the job (A.304-305). No substitution was allowed.

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[19] The subcontract between Acme and Three Boro was formalized in a written agreement executed on December 6, 1973 (A. 114-115).

On October 25, 1973, Carrier filed the initial unfair labor practice charge herein based, *inter alia*, upon the events at the Van Etten job (A.36). Nevertheless, Carrier continued to explore ways of settling the underlying dispute without litigation. Thus, about November 18, 1973, Carrier spokesmen met with Pasquinucci at his office to discuss the problem. Pasquinucci "said that he could not permit the unit to come in [to New York]" (A.5, 37; 222). Also, Pasquinucci suggested that Carrier "give consideration to sending into New York the cut pieces of the unit, deliver them to some shops in New York, which could take the cut pieces and put them together and make the units" (A.5; 222). He proposed that "approximately 75 units . . . come in this way, so that they could get the experience and after that, the entire unit would be made in New York" (*Ibid.*). He further suggested that Contardi visit a New York sheet metal shop to see if Carrier could agree to have Moduline units fabricated in this way (A.222). If the units were manufactured in a Local 28 shop, Pasquinucci stated, "Then we wouldn't have no problem at all with the Moduline unit, and it would be accepted in its entirety" (A. 477). Contardi did visit one of the shops named by Pasquinucci on the day after Thanksgiving, 1973, and found it unacceptable. After discussing the idea with other Carrier officials, Contardi notified Pasquinucci that the Company "would not bring any units in for fabrication in New York" (A.33; 223).

The next meeting between Carrier and Local 28 representatives took place at Carrier's New York office in February 1974 (A.224, 470-471). There an agreement was reached whereby Local 28 would allow the Van Etten job to proceed to completion and Carrier would hold off on its unfair labor practice charge until after the Union elections on July 1, 1974 (A.6, 37; 225-226, 470-471). It was further agreed that after the elections, the parties would execute a written memorandum setting forth Local 28's agreement to "accept and install Carrier Dual

Moduline Units as fabricated, tested and calibrated at Carrier's factory." Carrier would then withdraw the pending unfair labor practice charges (A.37; 18).

While these discussions were in progress, the Moduline units previously ordered by Acme for the Van Etten job arrived in New York, and a problem arose over their acceptance by Three Boro at the jobsite. In an exchange of correspondence with Acme, Three Boro took the position for the first time that its subcontract with Acme did not contemplate shipment of the units with plenums already fabricated (A.140-141). As reflected in Acme's letter of reply, however, the pressures which led Three Boro to take that position were alleviated when Carrier reached its settlement agreement with Pasquinucci. The letter (A.142) stated in pertinent part:

> . . . it is our understanding that all differences have been resolved between Local 28 and Carrier Corporation in so far as the installation of Carrier Moduline units for the [Van Etten] job.
>
> Based on this agreement, you have agreed to proceed with installation of these units with the plenums as received from Carrier. . . .

The units were subsequently delivered to the Van Etten jobsite and installed without incident.

C. *Local 28's Reaffirmation of Intent to Enforce the Collective Bargaining Agreement Against Contractors Handling or Installing Moduline Units; The Charges Against General on the Presbyterian Babies Hospital Job.*

While the settlement efforts between Carrier and Local 28 were in process, an order was received for Moduline units for the Babies Hospital addition being constructed at Presbyterian Hospital. The specifications prepared for that project by architects Rogers, Butler and Burgun and consulting engineers Meyer, Strong and Jones called for Moduline Model 37AF air terminal units including plenums as fabricated by Carrier (A.67, para.

30, and 120). About January 1974, the Hospital entered into an agreement with H. Cohan Contracting Corporation to perform all mechanical work for the project, including a provision for the furnishing and installation of the Moduline units in accordance with the specifications (A.37; 67-68, para. 31, and 121). Thereafter, drawings prepared by Carrier and certified as approved by Meyer, Strong and Jones were supplied to Cohan for the installation of the units. The drawings show the units with plenums intact, as manufactured by Carrier (A.67-68, para. 31, and 122-129). About May 29, 1974, Cohan confirmed a purchase order with Carrier for delivery by Carrier to the Babies Hospital Addition of Moduline units in accordance with the specifications described above (A.68, para. 32).

About June 11, 1974, Cohan subcontracted certain sheet metal work on the Babies Hospital project, including installation of the Moduline units as specified and ordered, to General Sheet Metal, Inc. (A.37; 68, para. 34). General is a New York area sheet metal contractor and, as a member of the Contractors Association, is bound by the Standard Form agreement between the Association and Local 28 (A.37; 68, para. 33).

Thereafter, the Local 28 officers' elections were held as scheduled, and Pasquinucci was defeated in his bid for reelection. His successor, Edward Stack, was installed as president of Local 28 in early July 1974. On July 19, 1974, Contardi and others met with Stack to discuss the status of the settlement agreement with Pasquinucci discussed above (A.6, 37; 230-231). Stack requested time to review the situation and asked Contardi to call him in a few days (A.231). Contardi telephoned him the following week and asked the result of his review (A.231, 559). Stack replied that Local 28 would "insist that [Carrier] go along with" the collective bargaining agreement "as written" (A.6, 18, 37; 231, 293-294). Stack testified that the agreement he referred to was Local 28's agreement with the Contractors Association

(SMACNA) and any sheet metal companies with which it bargains independently (A.559-560).

Consistent with this position, Stack, on November 7, 1974, filed a charge on behalf of Local 28 against General, the sheet metal subcontractor on the Babies Hospital job. The charge alleges that (A.12, 38; 68-69, para. 35 and 145).

> GENERAL is in violation of our Collective Bargaining Agreement, Addendum B, Part II, last unnumbered paragraph, by permitting and or accepting work covered by our Agreement—fabrication of plenums—involving the Carrier Dual Moduline Unit, for installation at the Presbyterian Medical Center, Babies Hospital . . . to be performed by persons who are not within the bargaining unit covered by our Agreement, rather than by its journeymen and apprentice sheet metal workers.

The charge goes on to request that the matter be heard by the Joint Adjustment Board and that "reasonable compensation [be awarded] based on the loss of man-hours of work" (*Ibid.*).

On March 3, 1975, with the above charge still outstanding, General began installation of the Moduline units at the Babies Hospital job in accordance with its subcontract from Cohan (A.432-433). About March 7, 1975, at a meeting of the Joint Adjustment Board, the charge was discussed and Local 28 urged adoption of a resolution setting forth its proposal for disposition of the matter. The proposed resolution declared in substance that General was in violation of the collective bargaining agreement as charged, and called for payment by General of "the sum of $2153.60 to the Local 28 Sick Dues Relief Fund, representing the loss of man hours caused by General's said violation . . ." (A.130, 144, 146; 270, 432-433). No final action was taken on this proposed resolution or on any other disposition of the charge against General at that meeting (A.433).

Immediately thereafter, Morris Lipka, president of General, instructed the members of Local 28 employed by General at the Babies Hospital project to cease installation of the Moduline units on that job. Installation of the units thereupon ceased (A.12, 19, 38; 144). On the afternoon of March 14, 1975, Contardi met with Lipka and Edward Simek of Cohan, the mechanical contractor on the job, to discuss the work stoppage (A.570). As the ALJ found (A.19), Lipka told Contardi that "he had stopped the men working because he had been brought up on charges and was subject to a fine; he could not continue as he was not going to pay the fine" (A.19; 570-571). Speaking for Cohan, Simek put in that he "could not tolerate the pressure, because they were involved with other trades and they were threatening back charges" (A.19; 570-571). Contardi then told Lipka to contact Local 28 and settle whatever charges he had, that Carrier would pay the charges (A.19, 38; 571).

Thereafter, about March 17, 1975, Lipka met with Local 28 president Stack and told him General would pay the sum of $2,153.60 to the Union's Sick Dues Relief Fund as set out in Local 28's proposed resolution. Stack thereupon advised Lipka that the charges against General would be "settled" (A.144, quotation in original). About March 20, 1975, General issued a check to the Local 28 Sick Dues Relief Fund in the amount of $2,153.60, "as per [its] agreement" with Contardi (A.19; 144, 155-156, 570-572). Stack wrote back on March 21, 1975, acknowledging receipt of General's check and agreeing to notify the Joint Adjustment Board of the parties' "disposition of the subject grievance" (A.130, 144). Carrier thereafter reimbursed General for the full amount of the settlement payment, in accordance with Contardi's agreement (A.571-572). Installation of the Moduline units at Babies Hospital resumed, and the record shows no further interruption of the project.

THE FINDINGS AND CONCLUSIONS OF THE ADMINISTRATIVE LAW JUDGE AND THE BOARD

On the foregoing facts, the Administrative Law Judge found that the restrictive work clauses of Local 28's collective bargaining agreement with the Contractor's Association, as applied here to Carrier's Moduline units, violated Section 8(e) of the Act. Citing the Ninth Circuit's decision in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (1975), the ALJ concluded that Local 28's contract-enforcement efforts in this case were calculated to "influence the business decisions of the hospital builders" at the Van Etten and Presbyterian Babies projects and to cause Carrier to surrender its right to fabricate the plenum portion of the Moduline units "to others with whom Local 28 has a collective bargaining agreement . . . ." (A.21-22, 22-23). Additionally, the ALJ rejected the Union's claim that its enforcement of the clauses was for a lawful "work preservation" object, noting *inter alia* that the Moduline unit is "a new and different product" whose fabrication is not work traditionally performed by Local 28 members (A.21, 23) and further that "Local 28 members will not lose any work if Carrier continues to manufacture the plenums for its Moduline Units." (A.23). The ALJ therefore concluded that Local 28's reaffirmation and enforcement of its agreement with respect to the Carrier units, including its filing of contract-violation charges against General Sheet Metal, violated Section 8(e).

The ALJ also concluded that Local 28 had violated Section 8(b)(4)(i) and (ii)(B) by (1) the membership's adoption of the June 21, 1973, resolution not to make any allowance in the collective-bargaining agreement "to allow the dual Moduline Mixing Box in the New York City area"; (2) the various statements by Local 28 officials to Carrier representatives to the effect that the Union would not permit Moduline units to be installed in New York City unless Carrier agreed to

allow fabrication of the plenums in Local 28-affiliated shops; and (3) the refusal of Local 28 member Johansmeyer to perform sketching work on the Van Etten job, coupled with Pasquinucci's admission to Contardi that Local 28 had "refused to let them sketch the job." (A. 23-24).

The Board disagreed with the ALJ's findings, declaring that "a contrary result is dictated" by its decision in the *Associated General Contractors* case (A. 31).[20] The Board acknowledged in a footnote that the Ninth Circuit rejected its reasoning in that case, but stated that with "all due respect to that Court, we adhere to our decision . . ." (A. 40, n. 9).[21] Applying its *Associated General Contractors* rule, the Board held that Local 28's filing of charges against General under the collective bargaining agreement did not constitute statutorily proscribed restraint or coercion, and that its enforcement of the agreement through such "peaceful" contractual means did not violate 8(e) or 8(b)(4)(B). Viewing the other Union conduct alleged in the complaint against the premise that the Union was lawfully

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[20] See p. 3 n. 2, *supra*. The Board also cited its decision in the *Kimstock* case *(Southern California Pipe Trades Dist. Council No. 16, Plumbers and Steamfitters Local 582 (Kimstock Div., Tridair Industries, Inc.)*, 207 NLRB 711 (1973)). That case, which incorporated by reference the Board's rationale in *Associated General Contractors*, was settled while a petition for review was pending in the Ninth Circuit (A. 454-455).

[21] The Union did not attempt to argue before the Board that a result in its favor could be reconciled with the Ninth Circuit's decision in *Associated General Contractors*. Rather, it urged the Board, in effect, to disregard the court's decision in that case, as the Board subsequently did. Thus, the Union's brief to the Board (which we have lodged with this Court) states at p. 58:

> While Respondent readily concedes that this decision of the Ninth Circuit is in point and would be precedent as to the § 8(e) allegation were this matter before that court, it is unclear why the ALJ, adjudicating a case in the City of New York (review of which can only be had before either the Second Circuit Court of Appeals or the District of Columbia Court of Appeals) cited Ninth Circuit precedent.

entitled to enforce its agreement with the contractors in this manner, the Board also rejected the ALJ's other findings of inducement and coercion in violation of 8(b)(4)(i) and (ii)(B). Accordingly, the Board ordered that the complaint against the Union be dismissed in its entirety, without any consideration of "the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed" (A. 41).

ARGUMENT

I. THE BOARD'S RULE PERMITTING ENFORCEMENT OF SECONDARY BOYCOTT AGREEMENTS THROUGH CONTRACTUAL GRIEVANCE PROCEDURES AND FINES IS CONTRARY TO THE MEANING AND INTENT OF SECTIONS 8(e) AND 8(b)(4)(B).

A. Introduction.

As shown above, the Board's holdings in this case and *Associated General Contractors of California, supra*, set forth the rule that enforcement of clauses in a labor contract which, as interpreted by the parties, proscribe the installation or handling of another employer's products, does not violate Section 8(e) or 8(b)(4)(B) of the Act so long as it is confined to "peaceful means provided by the agreement," such as the institution of breach-of-contract proceedings leading to levies of monetary fines. This rule applies, under these Board holdings, even though the union's contract-enforcement efforts may have been undertaken in furtherance of a secondary objective and are not protected by the "construction industry proviso" to Section 8(e). We submit that the Ninth Circuit was correct in concluding in *Associated General Contractors of California* v. *N.L.R.B.*, *supra*, that the Board's rule is based on an erroneous interpretation of Sections 8(e) and 8(b)(4)(B), and that such labor practices are "illegal under both of these sections of the NLRA." 514 F.2d at 437. Accordingly, we urge this court to follow the Ninth Circuit's decision and reverse the Board's holding.

B. The Statutory Framework.

Section 8(e) of the Act prohibits labor agreements, "express or implied," whereby an employer commits himself "to cease using, selling, handling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . ." [22] It declares such agreements to be "unenforceable and void." Section 8(e) specifically prohibits the "entering into" of such agreements, but its application is not limited to the original signing of a contract. Rather, a violation of 8(e) may be found whenever such an agreement is "reentered into" by reaffirmation or enforcement of its terms within the 6-month period preceding the filing of an unfair labor practice charge.[23] See *Danielson* v. *Masters, Mates and Pilots (Seatrain Lines, Inc.)*, 521 F.2d at 747, 754 (2d Cir. 1975), and cases cited therein at n. 8. *Cf. N.L.R.B.* v. *Local 28 Sheet Metal Workers*, 380 F.2d 827, 829 (2d Cir. 1967).

Except for the "construction industry" and "garment industry" provisos to Section 8(e), neither of which is

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[22] Section 8(e) of the Act provides, in relevant part, as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .

[23] The 6-month limitation upon conduct which may be found to constitute an unfair labor practice is found in Section 10(b) of the Act. It does not prohibit consideration of earlier events which explain or illuminate events within the 6-month period. See generally *Bryan Mfg. Co.* v. *N.L.R.B.*, 362 U.S. 411 (1960).

involved here,[24] the only recognized exception to the broad literal language of Section 8(e) is the judicially-inferred exemption for agreements whose terms and maintenance are strictly "primary"—i.e., "addressed to the labor relations of the contracting employer vis-a-vis his own employees" and not "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 644, 645 (1967). Accordingly, where an agreement falling within the literal proscription of Section 8(e) is maintained or enforced within the 6-month period, the statute compels the finding of a violation unless the circumstances establish that the union's sole object was "primary" within the foregoing test.[25] *National Woodwork Mfrs.* v. *N.L.R.B.*, *supra.*

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[24] The "construction industry proviso" to Section 8(e) is set forth in footnote 22, above. The proviso's application is restricted to work which is to be performed solely at a construction site. See *Acco Constr. Equip., Inc.* v. *N.L.R.B.*, 511 F.2d 848, 851-852 (9th Cir. 1975); *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.)*, 136 NLRB 977, 988 (1962); and *Essex County Dist. Council of Carpenters* v. *N.L.R.B.*, 332 F.2d 636, 640 (5th Cir. 1964). See generally, *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 626-631 (1975). Local 28 has conceded that the work in question in this case would not have been done on construction sites even if its demands had been met, but rather in offsite sheet metal fabrication shops (U. Br. to NLRB at pp. 17-18). Accordingly, it took no exception to the ALJ's finding (A. 22) that the construction industry proviso is inapplicable.

[25] It is well settled that the legality of an alleged secondary boycott is not determined by the union's major or principal objective, but it is "sufficient that an objective . . . although not necessarily the only objective," be secondary. *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 680 (1951); *Bedding, Curtain & Drapery Workers Union, Local 140* v. *N.L.R.B.*, 390 F.2d 495, 499 (2d Cir. 1968), cert. denied 392 U.S. 905.

C. Local 28's Enforcement of Its Agreement As Against Carrier's Moduline Units Violated Section 8(e) Even Without Regard to Restraint or Coercion.

1. *Restraint and coercion are not requisite elements of a Section 8(e) violation.*

An important point which the Board's rule overlooks is that coercion is *not* required for Section 8(e) to be violated. As this Court pointed out in *N.L.R.B.* v. *National Maritime Union*, 486 F.2d 907, 911 (2d Cir. 1973), cert. denied 416 U.S. 970, the purpose of Section 8(e) was to prevent a "hot cargo" boycott from occurring through *voluntary* agreement:

> Section 8(e) was enacted in 1959 as part of the Landrum-Griffin amendments to the National Labor Relations Act, which were designed to correct what many employers and members of Congress thought were statutory deficiencies in dealing with secondary boycotts. [Footnote omitted] In Carpenters Local 1976 v. N.L.R.B., 357 U.S. 93, (1958) (Sand Door), the Supreme Court had held that an employer's *voluntary* observance of a clause in his agreement with his employees not to handle nonunion goods was lawful under what was then section 8(b)(4)(A) of the Labor Act. 357 U.S. at 98-99. Section 8(e) was designed 'to plug this gap in the legislation by making the . . . clause itself unlawful.' National Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 634, (1967). (Emphasis added).

Accordingly, the Board may not dismiss a Section 8(e) charge simply by determining that the union has not coerced or restrained an employer in the application of such an agreement. Coercion becomes relevant only if it is determined that the clause, as interpreted and applied, is lawful under Section 8(e). For even then, the Act narrowly limits the union to "judicial means" to enforce the contract, and a valid clause may not be enforced by conduct which constitutes restraint or coercion under Section 8(b)(4)(B). See, for example, *N.L.R.B.* v. *IBEW, Local 769 (Ets-Hokin Corp.)*,

405 F.2d 159, 163 (9th Cir. 1968), cert. denied 395 U.S. 921, cited with approval by this Circuit in *Seatrain Lines, supra*, 521 F.2d at 754, n. 8. See also *Local 48, Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964). A clause which violates 8(e), however, is expressly declared to be "void," and the statute prohibits its enforcement by *any* means.

Consequently, the Board's dismissal of the complaint on the sole basis of its opinion that the Union's enforcement techniques were not coercive, was clearly improper. Since, as shown below, the contract clauses enforced in this case, as applied to Carrier's Moduline units, fell squarely within the scope of Section 8(e)'s literal prohibition and were not shown to have been implemented solely for a primary objective, the statute required a finding that Local 28 violated Section 8(e).

2. The SMACNA agreement, as interpreted and applied, plainly required the sheet metal contractors to boycott Moduline units as fabricated by Carrier.

Although "work preservation" clause may be valid on its face, it is clear that such a clause can be interpreted and applied in a manner which violates Section 8(e). *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 439; *N.L.R.B.* v. *Milk Drivers Union, Local 753*, 335 F.2d 326 (7th Cir. 1964), cited with approval in *Danielson* v. *Masters, Mates and Pilots (Seatrain Lines, Inc.)*, *supra*, 521 F.2d at 754, n. 8. Thus, an inquiry into the Union's conduct under Section 8(e) does not end with a mere examination of the written language of the contract itself, but rather entails an examination of the circumstances in which the union attempts to apply the clause. *Cf. Danielson* v. *Masters, Mates and Pilots (Seatrain Lines, Inc.)*, *supra*, 521 F.2d at 754.[26] Moreover, the union's illegal

[26] If an attempt to enforce an invalid interpretation of the clause occurs within the six months prior to the filing of an unfair labor

demand is alone sufficient to support a Section 8(e) finding; compliance or acquiescence on the part of the employer is not required. See *Seatrain Lines, supra*, 521 F.2d 754, at n. 8.

As shown in the Facts, *supra*, pp. 8-25, there is no question that Local 28 officials have consistently interpreted Addendum "B," Part II of the SMACNA Agreement to prohibit signatory contractors from handling or installing Moduline units unless the plenums for such units were fabricated and installed by journeymen or apprentice sheet metal workers represented by Local 28.[27] This interpretation has repeatedly been reaffirmed by the Union within the Section 10(b) period and acquiesced in by the contractors. Although Carrier permitted some units to be completed in this manner, the results were unsatisfactory and it became apparent that the Union's demands were economically unfeasible. Despite recommendations of two separate committees that the contract be modified to permit the introduction of Carrier units, both the Union's Executive Board and the Joint Adjustment Board (established by the contract) refused to modify the agreement to permit even a pilot project using Moduline units. Indeed, the Executive Board of Local 28 passed a resolution on May 30 and June 5, 1973, that "no allowance" in the contract "at all be made to allow the dual Moduline Mixing Box in the New York City area" (A. 13, 35; 135).[28] On June

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practice charge related thereto, the Section 10(b) six months statute of limitations will not apply. See *Danielson* v. *Masters, Mates and Pilots, supra*, 521 F.2d at 754 and cases cited therein at n. 8.

[27] Indeed, before the Board the Union candidly stated that its position, as stated to Carrier over a 10-year period, had been that the Union "would not waive its contractual rights with regard to the new Carrier units if shipped into New York City with plenums already fabricated and attached" (U. Br. to NLRB at pp. 50-51).

[28] It should also be noted that at no time throughout the entire history of this controversy has the Contractors Association ever disavowed the interpretation of the agreement espoused by Local 28, or suggested that it does not apply to the Moduline units. The

21, 1973, the Local 28 membership voted to approve the Executive Board resolution. See p. 18, *supra*. Thereafter, Pasquinucci told Contardi that he was refusing to permit Local 28 members to sketch the Van Etten job and would not permit the Moduline unit to come into New York. See *supra*, p. 20.

Local 28's contractually-based boycott culminated in contract grievance charges which it filed in March, 1975, against General Sheet Metal for "permitting and/or accepting work covered by our Agreement," i.e., the fabrication of plenums for Moduline units, "to be performed by persons who are not within the bargaining unit covered by our Agreement" rather than Local 28 members. See *supra*, p. 24. General acquiesced in and agreed with this interpretation of the agreement, in that it paid the $2,153.60 demanded by the Union as compensation for "the loss caused by General's said violation." [29]

The Board agreed (A. 33-41) with the Administrative Law Judge's determinations (A. 20-23) that the Union engaged in the above actions. Further, the Board stated that this conduct reflected the "Union's position that it would not relinquish its rights under the collective-bargaining agreement." (A. 39).

Association intervened in the Board proceedings below and was represented by counsel at the hearing, but at no point in the proceedings did its counsel ever suggest that the Association was not in agreement with Local 28 as to the applicability of their agreement to the Modulines. The Association's position in this respect must be assessed against the background of the Joint Adjustment Board's refusal in April, 1973, to approve a "modification" of the agreement to allow the units to be installed as fabricated by Carrier.

[29] The parties below stipulated to the facts surrounding the Union's grievance against General (A. 18-19; 130, 144, 146, 155-156, 566-567).

3. *The Union Applied the Contractual Work-Restriction Clauses in an Overly-Broad Manner Calculated to Achieve a Clearly Secondary Objective.*

a. *Local 28's contract-enforcement efforts against signatory contractors were tactically calculated to satisfy Union objectives vis-a-vis Carrier.*

As shown above, p. 30, *National Woodwork* requires that "work preservation clauses be applied for strictly "primary" objectives. Thus, the union's objectives must be addressed only to the labor relations of their own employer.[30] Where surrounding circumstances indicate that "one" of the union's tactical objectives is to influence the policies of some employer other than its own, then the union has a secondary objective which Section 8(e) prohibits. See *Local 644, Carpenters (Walsh Const. Co.)* v. *N.L.R.B.*, F.2d ——, 91 LRRM 2140, 2149 (D.C. Cir. 1975), reh. den. —— F.2d—— (1976). See also the cases cited *supra*, p. 30, n.25.

As discussed above, pp. 32-34, the Union's principal objective throughout this dispute has been to force Carrier, an employer with whom the Union had no bargaining relationship, into changing its method of constructing the Moduline unit to conform to the Union's interpretation of the SMACNA contract. Consistently in these proceedings, both in the hearing (A. 435-440) and before the Board (Br. to NLRB at 48-49), the Union asserted that its 10-year objective, since Carrier's attempted introduction of the Moduline unit into New York, had been to force Carrier to change its fabrication and assembly methods. The Union also repeatedly

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[30] The Court's *National Woodwork* opinion consistently speaks of the right of employees to engage in "activities to pressure *their own employers* into improving the employees' wages, hours and working conditions," and emphasizes that Congress did not mean "to strike from workers' hands the economic weapons traditionally used against *their employers'* efforts to abolish their jobs . . ." 386 U.S. at 641, 643 (emphasis added).

argued that, because of this "running dispute" (Tr. 625, 632) Carrier was, in all relevant instances, the "primary" employer for the purposes of Sections 8(e) and 8(b)(4) (*Id.*).[31]

Among the Union's methods of furthering this objective "elsewhere" were refusing to permit Local 28 member employees of Three Boro to sketch the Van Etten job, and bringing economic and contractual pressure to bear on General. There was no way these subcontractors could have complied with the collective bargaining agreement as thus interpreted, except by ceasing to do business with the general contractor or otherwise bringing pressure, through him, upon the project owners and designers to change their specifications for the project. Nor could General avoid being cited for future "violations" except by either refusing to bid on projects where the specifications did not call for its employees to do all the tasks the Union regarded as their work, or otherwise seeking to force modification of any specifications.[32]

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[31] The statements of Union counsel inculde the following:

—". . . There is no question that Carrier is the one who controlled where the plenum was made, . . . We had a running dispute with Carrier from time one to the present date, but the action was directed against the primary [Carrier], and certainly were [sic] not directed against the secondary or neutral in this particular case." (A. 435-436).

—". . . We have been in a primary dispute with Carrier, and we have argued with Carrier from 1963 when this was introduced . . . But from the very beginning, and the present, argument was *always* between Carrier and 28, the primary dispute." (A. 438). (emphasis added).

—"The Carrier has full control, and they are the primary with respect to that item at this point; there is no question about it . . . That is what I am saying, this is a primary dispute with Carrier, and what they can do" (A. 438).

[32] Thus, this record leaves no room for doubt that a cessation of doing-business or handling goods within the meaning of Section 8(e) and Section 8(b)(4)(ii)(B) was *an* object of the Union's conduct. A complete cessation of business is not necessary to satisfy the "cease doing business" requirements of these Sections. See

Clearly, then, the Union's objectives extended beyond subcontractors such as General and Three Boro; its efforts were aimed at changing Carrier's policies with respect to the Moduline units. In this respect, General and Three Boro were "neutral unoffending employer[s] who [were] drawn into [Local 28's] dispute with [Carrier]." *Associated General Contractors of California, Inc.* v. *N.L.R.B., supra*, 514 F.2d at 437.

b. *In any event, Local 28 had no valid work preservation objective.*

Even apart from the foregoing considerations, which alone establish the Union's secondary object, the "work preservation" aspect of *National Woodwork* cannot afford the Union a defense. Thus, as the Administrative Law Judge correctly concluded (A. 21-22),[33] Local 28 has used its boycott here, not to protect its members against any real threat of loss of work they have traditionally and historically performed, but rather in an effort to acquire for its members the work of fabricating and assembling a new and unique product which they have not traditionally performed in the past and have neither the special equipment nor necessary training to perform properly now (A. 21, 23).[34] As set

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N.L.R.B. v. *Local 825, Int'l Union of Operating Engineers (Burns and Roe, Inc)*, 400 U.S. 297, 302-305 (1971). Were, as here for example, the business relationship can be continued only under onerous conditions such as the "payment of damages, the agreement 'impliedly' prohibits the 'doing business with another person.'" *Seatrain Lines, Inc., supra*, 521 F.2d at 753-754, n. 7. See also *N.L.R.B.* v. *Local 3, IBEW (New York Telephone Co.)*, 467 F.2d 1158 (2d Cir. 1972); *Associated General Contractors of California, Inc.* v. *N.L.R.B., supra*, 514 F.2d 437 at n. 6. *Cf. IBEW Local 501* v. *N.L.R.B.*, 181 F.2d 34, 37 (2d Cir. 1950), affirmed 341 U.S. 694 (1951).

[33] As with the primary-secondary issue, the Board did not deal with the work preservation aspect of this case (A. 41).

[34] See *Sheet Metal Workers, Local 162 (Associated Pipe and Fittings Mfrs.)*, 207 NLRB No. 132 (1974); *Local Union No. 98, Sheet Metal Workers Int'l Ass'n* v. *N.L.R.B.*, 433 F.2d 1189, 1193, 1196 (D.C. Cir. 1970); *N.L.R.B.* v. *Local 141 Sheet Metal Workers*, 425 F.2d 730 (6th Cir. 1970).

forth fully in the Facts, *supra*, pp. 6-8, the work in question does not, as the Union contended before the Board, merely consist of making a simple metal box familiar to its members. Rather, Carrier has developed a unique process for automatically regulating the volume of air flow throughout a building. The "whole heart of the unit" (A. 414) is the mating of plenums to the control portions of the units, and then calibrating and adjusting the bellows assembly to assure proper plenum pressure and air flow. This process must be performed *after* the control assembly has been attached to the plenum. Specially trained personnel are needed to mate the plenums to the control portion. Close supervision of Carrier engineering personnel is required to use the special, costly calibration equipment available only at the Tyler facility. From its inception, this work has been performed exclusively by Carrier's employees at its Texas facility, except for two occasions when limited attempts to have the work performed by Local 28 members in New York proved economically unfeasible and resulted in Carrier's inability to market the unit under the Union's conditions. The Moduline unit, therefore, "is a new and different product" that "is not work traditionally and historically performed" by the members of Local 28. See *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 438.

Additionally the Union's boycott of Carrier's product has had the anomalous result of reducing the amount of traditionally sheet metal ductwork available to Local 28. Thus, as the Administrative Law Judge pointed out (A. 21), there is no evidence that the Union's members would lose any work by abandoning their boycott. To the contrary, the only evidence in this record bearing on the potential impact of the Moduline on Local 28 members' jobs—the expert report of the Union's own Research and Review Committee, and the Sturgis report—clearly demonstrates that acceptance of the unit would create more, not less work, for sheet metal

workers. (See *supra*, pp. 13-16). Moduline units require a great deal of sheet metal ductwork—substantially more than those units with which they compete. As the Committee report points out, systems replaced by the Moduline include many systems cooled by water, rather than all air circulation, and thus providing substantial amounts of piping work for plumbers, but little sheet metal ductwork. Other types of systems replaced by the Moduline were also found to require much less sheet metal ductwork than is required for the Moduline.[35]

In short, notwithstanding the Union's repeated protestation about the "definite loss" to its members of plenum fabrication which would result from acceptance of the Carrier units, the fact is that the members cannot lose work they do not have, but would stand to gain other significant wor kif they were to abandon their boycott. In these circumstances, the ALJ was clearly warranted in rejecting Local 28's claim of a "work preservation" defense.

Moreover, even if the Union had stood to lose work as a result of the Modulines, the Union was clearly mistaken in its notion that if it placed direct pressure on subcontractors such as General and Three Boro, it could thereby "preserve" work on the Moduline units specified for installation on the Van Etten and Babies Hospital jobs. For the record is clear that the subcontractors had no discretion to yield to such pressures. As

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[35] Furthermore, the record fails to show that Local 28 members have traditionally performed comparable work on any other, competing types of variable volume systems installed in New York which would be lost or diminished if Moduline were admitted to the New York market. Indeed, no showing was made that any genuinely comparable products exist. To the contrary, the Union Research and Review Committee's report—again the only evidence in the record going to this issue—specifically states that "Competitive systems which are acceptable in New York City do not offer any additional sheet metal work. In fact, some competitive offerings are used with a large control device and a minimum number of outlets, which in turn, require a minimum duct distribution system" (A. 97). And see n. 16, *supra*.

Union counsel later conceded, Carrier alone at all times had "full control" over the work in question (A. 435-436, 438-439). Also, Carrier owned numerous patents covering the fabrication and assembly of the entire Moduline unit. These patents require Carrier's consent for partial or complete fabrication of the units by other than Carrier's own employees. See n. 7, *supra*, p. 6. Furthermore, neither Three Boro nor General had any authority whatsoever under their subcontracts to decide whether Carrier units would be used on the projects. That decision had been made by the project architects, engineers and owners at a level several stages removed from the sheet metal subcontractors (A. 20-21). Contract bid awards, upon which the subcontracts were based, were strictly limited by the initial project specifications. See *supra*, pp. 18-20 and 22-23. Consequently, the subcontractors' only means of complying with the Union's demands was to try to use their influence to force a change in that decision or cease working on the projects.[36] As this Court has indicated, such union pressures are illegal under Section 8(b)(4) since "under the construction contract . . . the work was withdrawn from [the secondary employer] so that . . . *at the time the unfair labor practice was committed* the work was wholly within the control of [another employer]." *N.L.R.B.* v. *Enterprise Ass'n, Local 638*, 285 F.2d 642, 646 (2d Cir. 1960) (emphasis in the original).

The fact that the Union misdirected its pressures against these subcontractors undercuts the Union's work preservation claim, and highlights the Union's secondary objective of furthering its dispute against Carrier by pressuring unoffending employers caught in a controversy not their own. See *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), enf'g 201 NLRB 59 (1973); *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 437-

[36] As previously noted, *supra*, pp. 36-37, n. 32, either of these courses would amount to an illegal cessation of business.

438.[37] The situation in *National Woodwork* was markedly different. There the contract specifically stated that Union members would not be required to handle prefabricated doors. Frouge, a general contractor and party to the agreement, contracted for the purchase of prefabricated doors even though the job specifications did not require him to do so. No subcontract was involved, and there was no evidence that the work stoppage there was directed at the policies of any person other than Frouge. See 386 U.S. at 615-616. In the instant case, by contrast, the long history of the dispute and admissions of the Union itself establish that the Union's secondary pressures against General and Three Boro were directed against Carrier. See *supra* pp. 32-37.[38]

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[37] As noted, the Board improperly failed to reach the "secondary-primary employer" issue here (A. 41). As the previous discussion points up, however, in this case "the normally difficult task of classifying union conduct [as either 'primary' or 'secondary'] is easy." See *N.L.R.B.* v. *Local 825, Operating Engineers (Burns and Roe, Inc)*, *supra*, 400 U.S. at 303. Accordingly, this issue can be disposed of by the Court without further consideration by the Board as was done by the court in *Associated General Contractors of California*, *supra*, 514 F.2d at 437.

[38] Such abundant and direct evidence of secondary objectives is seldom available. In other cases, therefore, the Board has inferred a secondary purpose from the fact that the employer against whom the union enforces "work preservation" requirements lacks the "right to control" the work the union seeks and is therefore powerless to satisfy the union's demands except by relaying the pressure to another employer. See, e.g., *Local No. 438, United Ass'n (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enforced sub nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, *supra*, 490 F.2d 323; and *Enterprise Ass'n, Local 638 (The Austin Co.)*, 204 NLRB 760 (1973), enforcement denied sub nom. *Local 638, Plumbers and Pipefitters* v. *N.L.R.B.*, 521 F.2d 885 (D.C. Cir. 1975), petition for certiorari granted —— U.S. ——, 44 U.S.L.W. 3462 (1976). If such control is lacking, the Board will infer, *prima facie*, that the union's intention is to press its objective "elsewhere." In the Carrier-Local 28 dispute, however, reliance upon such inferences is not required, because the inability of the subcontractors to resolve the Union's demands merely corroborates other ample direct evidence of the Union's secondary intentions vis-a-vis Carrier. See *Local 644, Carpenters* v. *N.L.R.B. (Walsh Const. Co.)*, *supra*, —— F.2d —— at ——, 91 LRRM at 2151-2152.

[Footnote continued on page 42]

In summary, the facts of this case establish a number of independent indicia of the Union's secondary objective. There is the long history of this dispute, in which the Union repeatedly addressed demands regarding the work in question to Carrier. There are the Union's concessions and other clear evidence that Carrier, not the jobsite contractors, was the "primary" in the dispute, and the only party having authority to yield to the Union's demands. There is the unrefuted evidence showing that the Union's real aim was not to "preserve" traditional work for its jobsite members, but to acquire for employees in Local 28 shops new fabrication tasks which were not fairly claimable by them. Finally, there is the clear showing that the pressured subcontractors lacked the power to assign the work to members of Local 28, and could, at most, only respond by relaying the pressure to others. Carrier believes that, under the authorities cited above, any one of the foregoing factors would be sufficient to show an unlawful object. This Court, however, need not go so far, for clearly, taken in combination, these factors leave no room for any conclusion other than that reached by the ALJ—i.e., that the Union had a secondary objective prohibited under Sections 8(e) and 8(b)(4)(B).

D. In Any Event, The Union's Grievance and Fine Against General Constituted an Impermissible and Coercive Means of Enforcing the Union's Interpretation of the No-subcontracting Clause.

As shown, the Board predicated its dismissal of the Section 8(e) charge upon its conclusion that neither the filing of the grievance nor fine against General constituted unlawful restraint or coercion of General within the meaning of clause (ii) of Section 8(b)(4) of the

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[38] [Continued]

Accordingly, while we feel that the Board's control doctrine is a correct statement of the law, we submit that, for the purposes of the instant case, the Court need not enter the "right to control" debate now before the Supreme Court in *Local 638, Plumbers and Pipefitters* v. *N.L.R.B., supra.*

Act.[39] The crux of the Board's holding then, as it was in *Associated General Contractors*, is that fines and other penalties do not amount to coercion or restraint within the statutory prohibition if they are imposed pursuant to a "reasonable" and "peaceful" contractual procedure (A.40).[40] The Ninth Circuit, however, found no merit in the Board's position and concluded in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 438-439:

> We believe that when Congress used "coerce" in Section 8(b)(4)(B) it did not intend to proscribe only strikes or picketing, but intended to reach any form of economic pressure of a compelling or re-

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[39] Section 8(b)(4) provides, in relevant part, that it shall be an unfair labor practice for a labor organization:

* * * *

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

[40] The fallacy of this approach was discussed by Member Kennedy in his dissent in *Associated General Contractors of California*. He pointed out several instances in which the Board had held (1) that pressures applied against a secondary employer are none the less coercive merely because they are invoked pursuant to what the Board calls "voluntarily agreed upon" contract provisions, and (2) that a union's threats to impose monetary penalties upon an employer in furtherance of a proscribed object are equivalent to a threat of a proscribed work stoppage and therefore are proscribed by Section 8(b)(4). See 207 NLRB at 702, and cases cited therein. Manifestly, if threats to impose a contract penalty are coercive, the actual imposition of such penalties cannot be regarded as otherwise. The Board recognized as much when it upheld an administrative law judge's findings that a union's levies of fines under a collective bargaining agreement violated Section 8(b)(4)(ii)(B) when applied for a secondary purpose. *International Union of Operating Engineers, Local 12 (Acco Constr. Equip., Inc.)*, 204 NLRB No. 115, 83 LRRM 1457 (1973), enforced *Acco Construction Equip., Inc.* v. *N.L.R.B.*, 511 F.2d 848 (9th Cir. 1975).

straining nature. [Acco Construction Equipment, Inc. v. N.L.R.B., 511 F.2d 848, 852 (9th Cir. 1975)]; N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO, 405 F.2d 159, 162 (9th Cir. 1968), enforcing Ets-Hokin Corporation, 154 NLRB 839, cert. denied, 395 U.S. 921 (1969); Local Union No. 48 of Sheet Metal Workers International Association v. The Hardy Corporation, 332 F.2d 682, 686 (5th Cir. 1964).

Here, the three and a half day work stoppage and the $557.76 assessment against Ohland had the desired effect of pressuring him to pressure others to change their business practices. Inevitably, no subcontractor who is bound by a provision of the type involved here will install prefabricated scrub sinks unless he has an agreement that he will be reimbursed for assessments and other sanctions levied against him. This practice will influence the business decisions of hospital builders and scrub sink manufacturers. The measures used against Ohland are forms of economic pressure proscribed by Section 8(b)(4)(B). [Footnote omitted] Acco, supra.

This Court, too, has found such contractual procedures to be illegally coercive. Thus, in *Danielson* v. *Masters, Mates and Pilots (Seatrain Lines, Inc.)*, *supra*, 521 F.2d 747, the union invoked contractual arbitration proceedings and demanded damages for "lost wages and contributions" resulting from Seatrain's alleged violation of a "work preservation" clause. This Court authorized the issuance of a Section 10(*l*) injunction against the Union, and specifically held that "the obvious purpose of the damage provision is to *coerce* Seatrain to sell vessels only to a transferee willing to sign up with the Union." 521 F.2d at 753 (emphasis added). Thereafter, the Board itself found that this same conduct:

> [did] not insulate Respondent's conduct from the proscription of Sec. 8(e) which, by its very terms, makes unlawful agreements to cease doing business 'whether express or implied' . . . Seatrain's potential liability for open-ended damages, demanded by Re-

> spondent pursuant to its collective bargaining agreement, imposes such onerous conditions upon Seatrain's sale of its vessels as to clearly fall within this category.

See *Int'l Organization of Masters, Mates and Pilots, AFL-CIO (Seatrain Lines, Inc.)*, 220 NLRB No. 52, 90 LRRM 1691 (1975).

In the instant case, the Board did not even discuss—and, indeed, could not logically deny—the potential effectiveness of similar penalties imposed against General. Thus, Rule XIX of the contract (see *supra*, p. 5) specifically provides for "censure" of contractors on the first occasion they are found to be in breach. In an industry where acceptability to the union is as vital to a contractor's economic interests as it obviously is in the sheet metal industry in New York City, we submit that even the implicit threat of such a penalty clearly amounts to a restraint within the proscription of Section 8(b)(4)(ii)(B). Indeed, loss of contractor acceptability to Local 28 could result in a corresponding loss of future subcontracts. Such an impact on the contractor is potentially much more severe than a strike or penalty fine related to the installation of a particular specific disputed product.

Moreover, this coercive effect actually was manifested in the reaction of General and Cohan, who immediately informed Carrier they had to cease installation of the Moduline units because they could not tolerate the pressure resulting from the filing of charges and levying of fines. See *supra*, p. 25. Clearly this was the reaction sought and intended by Local 28, for as the Board itself observed, Local 28 officials repeatedly equated enforcement of their contractual remedies with "the effect that "[M]oduline units would not be allowed into New York City." (A.39, 41).

Furthermore, there is no factual predicate for the Board's unsupported assertion that the Joint Adjustment Board proceedings were "contractually fair procedures."

(A.40). In fact, the record shows nothing about those procedures, except that the JAB itself consisted of equal numbers of local contractors and Union representatives. But both the contractors and the Union have a distinct self-interest in interpreting this contract in such a way as to require additional fabrication work to be done in New York, and neither side can be expected to protect the interests of outside manufacturers with which the Act is concerned. In no sense can such a tribunal, then, be equated with a judicial forum.[41] It must be remembered, moreover, that the sheet metal contractors making up the Association perform two separate kinds of functions: operation of shops where fabrication work is done and performance of jobsite services. When issues arise involving the fabrication of products to be installed on New York jobsites, contractors who operate such shops may have interests quite different from those of the particular contractor seeking to perform disputed installation work. Obviously, it is beneficial to the former to try to secure new fabrication work, even at the risk that some installations may be interfered with. In these circumstances, it would not be surprising for a contractor called before the JAB on charges of installing prefabricated goods to find that even some of the contractor representatives on that board are biased in favor of ruling to exclude such goods.[42]

Although these indices of coercion were pointed out to the Board, the Board completely failed to mention them,

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[41] As noted elsewhere, the enforcement of lawful work preservation agreements is limited to "judicial" means. See *supra*, pp. 31-32.

[42] Even if we assume the fairness of the contractual proceedings, the fact still remains that the Union was asking the JAB to apply an "unenforceable and void" interpretation of the contract in a clear secondary manner which would in no way advance the Union's work preservation claims. As this Court has indicated, the NLRA does not tolerate such a result and no deference to the parties' contractual proceedings is permitted. See *Danielson* v. *Masters, Mates and Pilots (Seatrain Lines, Inc.)*, *supra*, 521 F.2d at 754-755.

or to analyze the reasonableness of the penalties or the fairness of the procedure (A.40). Apparently the Board believes that such measures do not "coerce or restrain" in the statutory sense as long as they are contained in a collective bargaining agreement and enforced against a party thereto (*Id.*).[43]

It cannot validly be argued that simply because the subcontractor agreed to subject himself to contract penalties at the time he entered into his agreement with the union, he is not "restrained" or "coerced" when those penalties are later enforced against him in support of a secondary boycott. Essentially the same argument was rejected by the Supreme Court in the *Sand Door* case, *supra.* (*Local 1976, Carpenters* v. *N.L.R.B. (Sand Door & Plywood Co.)*, 357 U.S. 93 (1958)). There, the union urged that, because the employer had voluntarily agreed that his employees would not be required to handle non-union prefabricated doors, the union's subsequent enforcement of the agreement by causing a work stoppage did not constitute unlawful coercion of the employer. The Court disagreed, holding that the employer's consent did not legitimize the union's secondary pressure. The Court stated that the freedom from coercion accorded to em-

[43] In *AGC of California*, the Board stated that it was "well aware of the possibility of abuse in this area, and that even the most innocent-appearing contractual provisions can . . . sometimes be invoked in such a way as to disguise coercive tactics . . ." 207 NLRB at 700. However, the Board's *per se* application of its *AGC* holding in the instant case belies its assurance there that it was confining its ruling "closely . . . [to] the facts before us, which show a careful and *bona fide* application of a contract which, in this case, at least, appears to have been reasonably applied." (*Id.*) Furthermore, the Board's cursory treatment of the coercive aspects of the Union's invocation of the SMACNA contract against General contrasts markedly with its analyses and findings in similar situations found in *Seatrain, Acco,* and *Ets-Hokin, supra,* pp. 47-48. It appears, therefore, that the Board has once again disregarded the admonition of this and other courts that it is under an obligation to articulate its reasoning and to distinguish factually similar cases with contrary results. See *N.L.R.B.* v. *General Stencils, Inc.*, 438 F.2d 894, 901-905 (2d Cir. 1971); *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965).

players under what was then Section 8(b)(4)(A) of the Act (the present Section 8(b)(4)(B)) requires that the employer be given—

> . . . a freedom of choice *at the time the question whether to boycott or not arises in a concrete situation* calling for the exercise of judgment on a particular matter of labor and business policy. *Such a choice*, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—*must as a matter of federal policy be available to the secondary employer—notwithstanding any private agreements entered into between the parties.* [357 U.S. at 105 (emphasis added)].

It is submitted that a union's imposition of fines and other penalties against a secondary employer who fails to honor a product boycott constitutes a direct interference with this freedom of choice. Indeed, the obvious reason for including provisions for such penalties in a collective bargaining agreement is to deter employers from exercising precisely this sort of "free choice" at the time "the question whether to boycott or not arises." Hence, such penalties must be regarded as violative of the overriding federal labor policy recognized by the Supreme Court in *Sand Door*.

Significantly, the Court reached its decision in *Sand Door* despite its observation that the Act, as worded at that time, did not make such contractual "hot cargo" provisions unlawful in themselves. The foregoing reasoning applies *a fortiori* where the contractual clauses are relied upon a manner which is illegal and void under the "hot cargo" prohibitions of Section 8(e), which Congress added to the Act following the *Sand Door* decision. Yet, in this case, the Board relied on the parties' contractual provisions to justify the Union's conduct without ever considering whether those clauses, as applied, fell beyond the scope of Section 8(e). We submit that the Board's position is clearly untenable, and that the provi-

sions of the contract—whether legal under Section 8(e) or not (see discussion at pp. 31-32, *supra*)—could not exempt the Union's pressure techniques from the provisions of Section 8(b)(4)(B).

The statutory basis for the foregoing principles is clear. As the Court observed in *N.L.R.B.* v. *IBEW, Local 769*, *supra*, the "1959 amendments clearly reflect a Congressional attitude that *unions should have no power over neutral employers to compel secondary action.*" 405 F.2d at 163 (emphasis added). Accordingly, even though Congress exempted certain construction-industry clauses from the prohibition of Section 8(e), "Congress did not intend to countenance provisions in such agreements that provide for enforcement by means of union coercion or economic pressure." *Ibid.* It is difficult to envision a more direct form of "economic pressure" calculated "to compel secondary action," we submit, than the threat of censure by the industry and the imposition of monetary penalties against a neutral subcontractor based upon his failure to honor a union's product boycott.

For the foregoing reasons, we submit that the Union's imposition of fines and other contract penalties against subcontractor General constituted "coercion or restraint" under Section 8(b)(4)(ii) as a matter of law. As such, these penalties constituted an improper method of enforcing the contract's no subcontracting clause, regardless of the validity of the Union's interpretation of the contract.

II. THE BOARD ERRED IN CONCLUDING, CONTRARY TO THE ADMINISTRATIVE LAW JUDGE, THAT THE STATEMENTS AND CONDUCT OF LOCAL 28, ITS OFFICERS AND AGENTS IN FURTHERANCE OF THE BOYCOTT AGAINST CARRIER'S MODULINE UNITS DID NOT AMOUNT TO INDUCEMENT AND COERCION VIOLATIVE OF SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT.

A. The Unlawful Inducement to Local 28 Members Not to Perform Work Related to the Installation of Moduline Units.

The prohibition against union inducement or encouragement of work stoppages set forth in Section 8(b)(4)(i) is recognized as being "broad enough to include every form of influence and persuasion." *IBEW Local 501* v. *N.L.R.B.*, 341 U.S. 694, 701 (1951), affirming this Court's decision in 181 F.2d 34 (1950). Thus, prohibited inducements are not limited to such routine conduct as "direct orders, threats, or promises of benefit by union officials to the rank and file. An appeal by a union to its members to protect its work jurisdiction is also a form of inducement." *Local 349, IBEW*, 149 NLRB 430 (1964); see also *Carpenters Local 22*, 193 NLRB 688, 696 (1971).

Here, as the ALJ recognized (A.23), the Union engaged in a form of prohibited inducement when, at the membership meeting on June 21, 1974, a resolution by the Executive Board was read and approved which provided that "no allowance . . . at all be made to allow the dual Moduline Mixing Box in the New York City area." (See pp. 17-18, *supra*). The discussion and adoption of this resolution which already carried the imprimatur of the Union's governing body, was clearly calculated to induce or encourage Local 28 members thereafter not to perform work related to the Moduline.[44]

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[44] The Board misplaces its reliance on *Local 139, Int'l Union of Operating Engineers, AFL-CIO (Fox Valley Construction Material Suppliers Ass'n, Inc.)*, 182 NLRB 72 (1970) (A. 39, n. 8). There, an agent of the respondent Operating Engineers asked three

Indeed, the record strongly suggests the effectiveness of this inducement, for on the next occasion when a sheet metal worker represented by Local 28 was assigned by his employer to perform services with respect to a Moduline unit, those services were not performed. This incident involved the erasure of Moduline from the drawings prepared by Three Boro's sketcher on the Van Etten job. Local 28's responsibility for the sketcher's refusal to perform his duties on the Van Etten job is further confirmed by Contardi's credited testimony that Union president Pasquinucci, when called about the incident, acknowledged that he had "refused to let them sketch the job." (See p. 20, *supra*).[45] Thus, the record establishes that the Union engaged in conduct which both induced or encouraged employees to withhold their services in violation of Sec. 8(b)(4)(i)(B), and

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members of the Carpenters Union if they would leave the job if requested by the Engineers. The Carpenters responded that the appropriate means of getting them to leave the job was by a picket line, thereby giving "at least some indication that the carpenters did not regard [the] inquiry as an inducement to them to leave the job." 182 NLRB at 74. No picketing or work stoppage occurred. The Union's actions in the instant case go far beyond a casual inquiry from one union to another. Rather, Local 28's membership and governing body formally declared that the contract did not permit any member of Local 28 to install the Moduline unit.

In dismissing the charges relating to the resolution, the Board stated that "there is no suggestion in the resolution that the contract would be enforced by proscribed economic action." (A. 39). However, it must be assumed that, at a minimum, the purpose of the resolution was to subject offending contractors to the JAB procedures, including fines and censure. As we have shown above, pp. 42-49, the contractual procedures were coercive and violative of Section 8(b)(4)(B).

[45] The Board accepted the Administrative Law Judge's credibility finding in this respect (A. 23), but characterized Pasquinucci's response, "that's so," as ambiguous because it might have referred to the Union's "contract rights and remedies" rather than an encouragement to its members to refuse to work (A. 41). However, as previously noted, reliance on coercive contractual remedies to support an illegal contract interpretation provides the Union no defense. See footnote 44, immediately above.

coerced or restrained Three Boro in violation of Sec. 8(b)(4)(ii)(B). *Los Angeles Bldg. & Constr. Trades Council*, 215 NLRB No. 59, at pp. 9-10 (1974); *Local 370, United Ass'n of Plumbers (Baugham Plumbing and Heating Co., Inc.)*, 157 NLRB 20, 21 (1966).

B. Local 28's Restraint and Coercion Against Carrier

The record is replete with evidence of statements by Local 28 officials to Carrier representatives to the effect that the Union was not going to permit Carrier's Moduline units to be utilized or installed in New York because employees represented by Local 28 were not fabricating the plenums on the units. Thus, in addition to Pasquinucci's telephone remarks to Contardi on October 18, 1973 (discussed above), Pasquinucci is also shown to have told Contardi about November 18, 1973, that Moduline plenums must be fabricated in New York in order for the unit to "come in." (See p. 21, *supra*). And again, following Pasquinucci's defeat in the July 1, 1974, elections and the resultant breakdown of settlement efforts between the parties, new Local 28 president Stack admittedly told Contardi that the Union was "going to enforce [its] agreements" with respect to the Moduline. This, in the context of all that had gone before, amounted to an outright declaration that Local 28 intended to interfere with business relationships between sheet metal contractors and Carrier or its customers in order to prevent Carrier from marketing its units in New York as manufactured in Tyler, Texas.

The Union apparently regarded these statements as legitimate primary activity, since, in its view, it was engaged in a primary labor dispute with Carrier. See *supra* pp. 35-36 and n. 31. We submit, however, that inas much as Carrier has no bargaining duty or bargaining relationship with Local 28, actual or potential, and employs no members of the sheet metal trade within Local 28's jurisdiction, there could be no primary labor dispute between Carrier and that Union. Consequently,

coercive pressures directed against Carrier in an effort to force it to change its methods of fabricating and marketing its product were necessarily secondary and unlawful. See *George Koch Sons, Inc.* v. *N.L.R.B., supra*, 490 F.2d at 327, where the court pointed out that since "Koch and the unions were not privity . . . Koch, then was a neutral . . ." See also *United Brotherhood of Carpenters, etc., Local 112 (Summit Valley Industries, Inc.)*, 217 NLRB No. 129 (1975), 89 LRRM 1799, petition for review and cross-application for enforcement pending in Case No. 75-2064 (9th Cir.), and particularly the discussion at JD pp. 28-29.

The Board, in *Summit Valley, supra*, adopted the holding of the Administrative Law Judge that union pressures against a manufacturer of prefabricated products with whom it has no bargaining relationship are secondary and unlawful even if motivated by valid work preservation aims. *A fortiori*, here, where it has been shown that Local 28 has no valid claim of work preservation with respect to Carrier's Moduline units, restraint and coercion directed against Carrier was secondary and unlawful. The ALJ's findings (A. 24) that the statements of Local 28 representatives to Carrier violated Section 8(b)(4)(ii)(B) are therefore clearly entitled to affirmance.[46]

CONCLUSION

For the foregoing reasons, we submit that the Board's reversal of the Administrative Law Judge and dismissal of the complaint against the Union should be reversed. And since, as we have shown, the undisputed evidence on the present record is sufficient to establish the Union's unlawful conduct as a matter of law, further proceed-

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[46] Accordingly, as Carrier was not a party to the SMACNA contract, the Board should not be permitted to rely on the agreement to justify the Union's illegal coercion toward Carrier (see A. 39). *Cf. Connell Construction Co.* v. *Plumbers & Steamfitters Local 100, supra*, 421 U.S. 616.

ings are unnecessary and the Board should be instructed to enter an appropriate remedial order.[47]

Respectfully submitted,

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[47] To remedy the unfair labor practice found, the ALJ recommended only a routine cease-and-desist and notice-posting order (A. 26-27). This order is insufficient inasmuch as it fails to take account of the $2,153.60 payment made by General Sheet Metal to Local 28's Sick Dues Relief Fund pursuant to the illegal "hot cargo" agreement, and reimbursed by Carrier as a direct result of the Union's unlawful coercion. Reimbursement for this coerced payment is essential to restore the *status quo ante* and to prevent the Union from profiting from its own unlawful conduct. Accordingly, it is respectfully submitted that the ALJ's recommended order should be amended to require repayment of this sum to Carrier with the usual interest. See *Acco Construction Equip., Inc.* v. *N.L.R.B., supra*, 511 F.2d at 852.